

Conditionally granted in part, Denied in part, and Opinion Filed March 14, 2018



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00208-CV

IN RE SPEX GROUP US LLC AND SPEX ENGINEERING (UK) LTD., Relators

Original Proceeding from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-17592

MEMORANDUM OPINION

Before Justices Bridges, Lang, and Myers
Opinion by Justice Lang

In this original proceeding, the Court must decide two issues regarding the impact of the discovery stay found in the Texas Citizens Participation Act (“TCPA”) and a party’s request for injunctive relief in the underlying case. Specifically, we must determine whether a trial court may grant injunctive relief after a TCPA motion to dismiss is filed, but before that motion is heard and decided, and the scope of discovery permitted, if any, as to the request for injunctive relief. We conclude the trial court’s discovery orders violate the TCPA’s required discovery stay. We further conclude that the TCPA does not require a trial court to hear and decide a motion to dismiss brought under the TCPA before hearing and deciding requests for injunctive relief. We conditionally grant the writ in part and deny the requested relief in part.

Background

In the underlying proceeding, real party in interest MCR Oils Tools LLC (“MCR”) alleges that SPEX Offshore, Ltd. (“SPEX Offshore”) and relators SPEX Group US LLC (“SPEX Group”)

and SPEX Engineering (UK) Ltd. (“SPEX Engineering”) breached a license agreement with MCR, “misappropriated” MCR’s trade secrets and confidential information, and committed other torts relating to patented oil field technologies that MCR licensed to SPEX Offshore. Relators removed the lawsuit to federal court, but the case was remanded. The day the case was remanded, relators filed a motion to dismiss pursuant to Texas Citizens Participation Act (TCPA), codified in Chapter 27 of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (West 2015) (motion to dismiss may be filed if “a legal action is based on, relates to, or is in response to a party’s exercise of the right of free speech, right to petition, or right of association”). Four days later, following a non-evidentiary hearing, MCR obtained a temporary restraining order enjoining relators and SPEX Offshore from engaging in various activities related to MCR’s Licensed Patents and Licensed Technology, MCR’s confidential information, and the licensed products “as defined in” specific sections of the license agreement. The district court extended the temporary restraining order until March 20, 2018, set a temporary injunction hearing for March 16, 2018, granted expedited discovery related to the request for temporary injunction, and granted discovery related to the TCPA motion. This original proceeding followed. On March 1, 2018, we granted relators’ emergency motion for temporary relief, stayed the two discovery orders, and stayed the underlying proceedings. We denied relators’ request to stay the temporary restraining order, and requested and received a response from MCR.

A. The discovery orders

MCR filed a motion for expedited discovery in which MCR sought extensive discovery related to MCR’s request for injunctive relief. The trial court granted that motion and signed the expedited discovery order on February 23, 2018. The expedited discovery order authorizes four expedited depositions of the corporate representatives of relator SPEX Group, relator SPEX Engineering, SPEX Offshore, and non-party JET Research Center (“JET”), “up to three additional

domestic or international depositions of other parties and/or non-parties” that MCR deems necessary to prepare for the injunction hearing, and depositions of any witnesses any party intends to call at the temporary injunction hearing. The expedited discovery order requires relators and SPEX Offshore to produce documents responsive to MCR’s requests for production within three calendar days of the deposition notice. JET was ordered to produce responsive documents within five days of the date of service of the request. The discovery ordered in the expedited discovery order relates to the merits of MCR’s request for injunctive relief.

MCR also filed an “emergency motion for discovery pursuant to Tex. Civ. Prac. & Rem. Code § 27.006” seeking discovery related to relators’ TCPA motion to dismiss. The trial court granted the emergency motion on February 23, 2018. That order (“the TCPA discovery order”) compels the deposition of Jamie Oag, Chief Executive Officer of SPEX Group, SPEX Engineering, and SPEX Offshore (UK) Ltd, regarding his declaration in support of the TCPA motion and other topics regarding the TCPA motion. The order also compels the depositions of a corporate representative for relator SPEX Group, relator SPEX Engineering, SPEX Offshore, and non-party JET. Further, the TCPA discovery order requires Jamie Oag to respond to the twenty-one Requests for Production served on him. Those requests for production, however, relate to the merits of MCR’s claims. The TCPA discovery order also requires the corporate representatives of SPEX Group, SPEX Engineering, SPEX Offshore, and JET to respond to requests for production that are not limited to TCPA issues.

Finally, the court issued a “Letter of Request for International Judicial Assistance” that asks authorities in the United Kingdom to subpoena SPEX Offshore and relator SPEX Engineering for depositions and document production regarding the TCPA motion and merits-based areas of inquiry.

B. Relators' complaints

In this original proceeding, relators complain that (1) the temporary restraining order is void for failure to comply with Rule 683, (2) the trial court abused its discretion by signing a temporary restraining order after relators filed their TCPA motion to dismiss, and (3) the trial court abused its discretion by compelling relators and other parties and non-parties to submit to expedited depositions and respond to extensive written discovery related to the both the request for a temporary injunction and the TCPA motion. Relators argue that a trial court may not grant a temporary restraining order when a TCPA motion is pending and may not rule on a temporary injunction request until after the court disposes of the TCPA motion. Relators also argue the trial court abused its discretion by ordering more than “specified and limited discovery” relevant to the TCPA motion. They argue that all discovery related to the proceeding was automatically stayed when they filed the TCPA motion and, therefore, the trial court was prohibited from ordering discovery related to MCR’s requests for injunctive relief. Further, relators contend the discovery ordered regarding the TCPA motion is extensive and not “specified and limited discovery relevant to the motion” as required by section 27.006(b) of the TCPA. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(b) (West 2015).

Mandamus Standard

To be entitled to mandamus relief, a relator must show both that the trial court has clearly abused its discretion and that relator has no adequate appellate remedy. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). A trial court also abuses its discretion when it issues a void order. *Decker v. Lindsay*, 824 S.W.2d 247, 249 (Tex. App.—Houston [1st Dist.] 1992, no writ) (“Mandamus relief may be afforded where the trial court’s order is void.”). Because temporary restraining orders are not appealable, there is no remedy by appeal. *In re Office of Attorney Gen.*, 257 S.W.3d 695, 697–98 (Tex. 2008) (citing *In re Tex. Natural Res.*

Conservation Comm'n, 85 S.W.3d 201, 205 (Tex. 2002); *In re Newton*, 146 S.W.3d 648, 652–53 (Tex. 2004)).

Mandamus will also issue to correct a discovery order that was a clear abuse of discretion and for which there is no adequate remedy by appeal. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998). “A trial court abuses its discretion when it acts in an unreasonable or arbitrary manner” and “when it acts without reference to guiding rules and principles.” *Id.* If a court of appeals could not cure the trial court’s discovery error on appeal, such as where the trial court orders “production of patently irrelevant . . . documents imposing a disproportionate burden on the producing party,” mandamus is proper. *Id.*

Application of Law to Facts

Relators raise three chief complaints in their petition. We will address each in turn.

A. The temporary restraining order is not void.

Texas Rules of Civil Procedure 680 and 684 require a trial court issuing a temporary restraining order to: (1) state why the order was granted without notice if it is granted *ex parte*; (2) state the reasons for the issuance of the order by defining the injury and describing why it is irreparable; (3) state the date the order expires and set a hearing on a temporary injunction; and (4) set a bond. TEX. R. CIV. P. 680, 684. Rule 683 requires “every order granting an injunction and every restraining order” to state the reasons for its issuance and to be specific in its terms. TEX. R. CIV. P. 683. Rule 683 also requires a restraining order to “describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained.” *Id.* Orders that fail to fulfill these requirements are void. *In re Office of Attorney Gen.*, 257 S.W.3d at 697–98 (citing *InterFirst Bank San Felipe, N.A. v. Paz Constr. Co.*, 715 S.W.2d 640, 641 (Tex. 1986); *Lancaster v. Lancaster*, 155 Tex. 528, 291 S.W.2d 303, 308 (1956)); see *El Tacaso, Inc. v. Jireh*

Star, Inc., 356 S.W.3d 740, 747 (Tex. App.—Dallas 2011, no pet.) (injunction order void for failure to satisfy specificity requirement of Rule 683).

Here, the temporary restraining order enjoins relators and SPEX Offshore from certain, specified activities related to MCR’s Licensed Patents and Licensed Technology, MCR’s confidential information, and the licensed products “as defined in” specific sections of the license agreement. Relators complain that the temporary restraining order does not define “Licensed Patents and Licensed Technology,” “MCR’s Confidential Information,” or “the Licensed Products” and, instead, improperly references the license agreement. Relators contend the order violates Rule 683 by failing to describe the acts sought to be restrained “in reasonable detail and not by reference to the complaint or other document.” TEX. R. CIV. P. 683. These complaints were mooted, however, when the trial court modified the temporary restraining order on February 28, 2018 and attached and incorporate by reference the license agreement.

Relators also complain the trial court lacked good cause to extend the temporary restraining order. The trial court’s modified order extending the temporary order states that good cause exists for the extension because MCR would be “forced to defend” its injunction request “without the opportunity to obtain the necessary evidence” if the temporary restraining order expires before the injunction hearing. On this record, relators have not shown a clear abuse of discretion regarding the extension of the temporary restraining order.

B. The TCPA motion does not prohibit a trial court from granting injunctive relief while a TCPA motion is pending.

Relators also complain that the trial court did not have authority to grant the temporary restraining order after the TCPA motion was filed because the TCPA motion must be disposed of before other merits-based orders may be granted. Relators cite no direct authority to support this proposition, and the Court has found none. Relators cite *In re MetroPCS Commc’ns, Inc.*, 391 S.W.3d 329 (Tex. App.—Dallas 2013, orig. proceeding) by analogy. In *MetroPCS*, this Court

held that the trial court abused its discretion by granting injunctive relief without first ruling on relators' motion to dismiss based on a forum selection clause. *Id.* at 340. This Court concluded that the motion to dismiss on the forum selection clause should be given priority in ruling because requiring a party to go to trial on a request for injunctive relief in a forum the party has not agreed upon is "harassment" and inefficient. *Id.*

We recognize there is need for rulings to be made on a priority basis as to a TCPA motion and as to a forum selection clause motion. *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding); *Kirkstall Rd. Enterprises, Inc. v. Jones*, 523 S.W.3d 251, 252 (Tex. App.—Dallas 2017, no pet.). However, the need for rulings on a TCPA motion conflicts with the interest of a party in obtaining injunctive relief to prevent a competitor from using the party's trade secrets and confidential information. Further, and critically, the TCPA is silent regarding whether all underlying proceedings must be stayed pending determination of a motion to dismiss filed under the TCPA. We conclude the TCPA does not prohibit a trial court from considering and granting a temporary restraining order or a temporary injunction before deciding a motion to dismiss brought under the TCPA. Nevertheless, this does not mean that the trial court can permit unbridled discovery related to the request for injunctive relief before hearing and disposing of a motion to dismiss brought under the TCPA.

C. The discovery orders violate the TCPA's discovery stay.

"Except as provided by Section 27.006(b)," the filing of a motion to dismiss under section 27.003 of the TCPA suspends "all discovery in the legal action" until the court rules on the TCPA motion to dismiss. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(c) (West 2015). Section 27.006(b) provides a limited exception to the mandatory stay of discovery by allowing "specified and limited discovery relevant to the motion" on the court's own motion or a party's motion "and on a showing of good cause" TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(b) (West 2015).

Neither the TCPA nor Texas courts have defined the scope of “specified and limited discovery relevant to the motion to dismiss.” However, it has been determined that it is proper to allow the non-movant to depose the movant and obtain limited document production.. *E.G., Lane v. Phares*, No. 02-17-00190-CV, 2018 WL 895455, at *4 (Tex. App.—Fort Worth Feb. 15, 2018, no pet. h.) (allowing three-hour deposition of TCPA movant); *see also Warner Bros. Entm’t, Inc. v. Jones*, No. 03-16-00009-CV, 2017 WL 6757187, at *1 (Tex. App.—Austin Dec. 21, 2017, pet. filed) (allowing “limited discovery, including document production” and the deposition of one of the TCPA movants); . *Abraham v. Greer*, 509 S.W.3d 609, 615–16 (Tex. App.—Amarillo 2016, pet. denied) (limited discovery under section 27.006(b) could include deposing witnesses having relevant information). At a minimum, however, the discovery ordered must be “relevant to the motion to dismiss.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(b) (West 2015); *In re Elliott*, 504 S.W.3d 455, 465 (Tex. App.—Austin 2016, orig. proceeding) (granting a Rule 202 petition to allow pre-suit discovery ‘was not the “specified and limited discovery *relevant to the [TCPA] motion [to dismiss]*’ that the Act contemplates.”) (emphasis in original).

1. The expedited discovery order

Discovery is relevant to the motion to dismiss if it seeks information related to the allegations asserted in the motion. MCR’s motion for expedited discovery sought information related solely to the merits of MCR’s application for temporary injunction, did not reference the TCPA motion, and did not seek information relevant to the TCPA motion. The trial court’s expedited discovery order followed suit and ordered extensive discovery on an expedited basis, none of which related to the TCPA motion. Rather, the expedited discovery order relates solely to the merits of MCR’s request for injunctive relief. We conclude the trial court abused its discretion by granting the motion for expedited discovery, and relators have no adequate remedy on appeal from that order.

2. The TCPA discovery order

The same is not entirely true of the TCPA discovery order. Discovery is relevant to the motion to dismiss if it seeks information related to the allegations asserted in the motion. Some merits-based discovery may also be relevant, however, to the extent it seeks information to assist the non-movant to meet its burden to present a prima facie case for each element of the non-movant's claims to defeat the motion to dismiss. *Serafine v. Blunt*, 466 S.W.3d 352, 357–58 (Tex. App.—Austin 2015, no pet.) (TCPA requires the non-movant to present a prima facie case for each element of the non-movant's claims to defeat the motion to dismiss). But such merits-based discovery must still be “specified and limited” because a prima facie standard generally “requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.” *See In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (orig. proceeding) (internal quotation marks and citation omitted); *see, e.g., Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 80 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (applying standard in Chapter 27 case and explaining that Legislature's use of “prima facie case” implies imposition of minimal factual burden). A party would, therefore, not need multiple or lengthy depositions or voluminous written discovery in order to meet the low threshold to present a prima facie case.

Here, MCR argues that it needs the discovery ordered in the TCPA discovery order to meet the prima facie burden imposed by the TCPA. MCR sought depositions and responses to requests for production from Jamie Oag, who verified the TCPA motion to dismiss by affidavit, and from the corporate representative of the four defendants. MCR argued that the discovery was needed to obtain evidence regarding a non-exclusive list of nine issues. The request for Jamie Oag's deposition lists specific issues on which MCR sought to depose Oag. The requests as to the corporate representative depositions did not include specific topics in the motion, but referred to

the deposition notices attached to the motion. The deposition notices include the areas of inquiry for each deposition and include the nine-issue list set out in the motion as well as other, broader areas, such as relators' sales or revenues generated from the tools and technology at issue, the marketing of those tools and technology, representations made to MCR, and "MCR's Licensed Products, Licensed Patents, or Licensed Technology." The requests for production include broad requests for production of all correspondence between the SPEX parties or any third parties "referencing or mentioning the License Agreement or SPEX Ltd.'s obligations under the License Agreement," and documents evidencing SPEX's engineering, development, or creation of SPEX products, SPEX's marketing of SPEX products, and SPEX's use of SPEX products.

We conclude the TCPA discovery order is not properly limited to discovery of information necessary to meet the minimum burden of establishing a prima facie case for each element of MCR's causes of action, and is not limited discovery relevant to the TCPA motion. That order, therefore, violates section 27.006(b) of the TCPA. Although MCR may be granted discovery related to the TCPA motion, MCR must establish good cause for that discovery and the discovery must be "specified and limited discovery relevant to the motion." The trial court's order here is not properly limited to discovery relevant to the motion. We conclude the trial court abused its discretion by granting the discovery requested by MCR related to the TCPA motion, and relators have no adequate remedy on appeal from that order.

Conclusion

Under this record, we conclude the trial court abused its discretion by issuing the expedited discovery order and by granting the broad discovery requested by MCR as to the TCPA motion. We, therefore, conditionally grant the writ in part. We direct the trial court to vacate the February 23, 2018 expedited discovery order. We further direct the trial court to vacate the February 23, 2018 TCPA discovery order and, after a hearing, issue a new order limiting discovery as required

by the TCPA. We deny all other relief requested by relators, and we lift the Court's March 1, 2018 stay order. We are confident the trial court will comply with this opinion. A writ will issue if the trial court does not so comply.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

180208F.P05